STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 1998-892

August 3, 2000

MAINE PUBLIC UTILITIES COMMISSION
Investigation into the Rates of Cobbosseecontee Telephone and Telegraph Company Pursuant to 35-A M.R.S.A. § 7101-B

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. Summary

On July 14, 2000, Cobbosseecontee Telephone Company (Cobbosseecontee) filed a Motion for Assignment of Advocacy Staff and Other Relief (the Motion). The motion requests the assignment of advocacy staff pursuant to 35-A M.R.S.A. §1305(5)(C), and also raises other matters related to the necessity of a rate case, the burden of proof and the functions of advisors. In this Order, we deny Cobbosseecontee's motion.

II. Motion for Assignment of Advocates

Cobbosseecontee makes this motion pursuant to 35-A M.R.S.A. §1305(5)(C), which provides:

> The commission may assign one or more staff members who are not advisors in a proceeding to serve as advocates to facilitate negotiated settlements in the proceeding. If the commission receives a written request from all of the parties in an adjudicatory proceeding that one or more staff advocates be appointed to facilitate a negotiated settlement in the proceeding, the commission shall either grant the request or issue a written order explaining the reasons why the commission denies the request.

35-A M.R.S.A. §1305(5)(C) (underlined portion added by P.L. 1999, ch. 602 (eff. Aug. 11, 2000)).

First, we note that the new statutory language in this section is not yet in effect. Nonetheless, for purposes of considering the motion, we will act pursuant to the guidance provided in section 1305(5), including the new language. We further note that the statute makes the assignment of advocates discretionary unless a written request is made by all parties. The requirement that the request shall be granted or a written

explanation of denial provided applies only when all parties have made the request. Bell Atlantic (BA), The Telephone Association of Maine (TAM) and the Public Advocate (OPA) are parties to this case, in addition to Cobbosseecontee. Cobbosseecontee makes no mention of other parties in its Motion. On July 25, 2000, OPA and TAM submitted letters supporting the request. BA has not commented. Although we are not required to respond in writing, we nevertheless do so in this order.

The Motion does not explain how either the processing of the case or the parties would benefit from the assignment of advocates. There is, moreover, no explanation of how Cobbosseecontee expects that settlement would be furthered with the assignment of advocates[1]. Finally, the assignment of advocates would likely add additional time and expense to the process, which would continue to tax Cobbosseecontee's limited resources. We therefore deny Cobbosseecontee's request for the assignment of advocates.

III. Function of Advisors as Advocates

Cobbosseecontee argues that "the co-mingling of the advocacy function and advisory function violates the Maine Administrative Procedure Act and Cobbosseecontee's procedural and due process rights." As relief, it requests that "Advocacy Staff be assigned, so that advocacy will be conducted by a staff which does not control the procedural and evidentiary matters, which does not communicate ex parte with the ultimate decision makers and which does not advise the Commission in its deliberations and decision in this case. It is further the position of Cobbosseecontee that the only proper function of current Staff in these proceedings is as an Advocacy Staff." Motion at 5. The relief Cobbosseecontee seeks is to change the current advisors to advocates. It makes no motion to disqualify the advisors as biased. The OPA claims the advisors have already stated positions on issues yet to be resolved in the case and therefore, for reasons of due process, should not be advisors. TAM supports Cobbosseecontee's request.

This docket was opened in November 1998 to investigate the revenue effects of implementing the access rate reductions required by 35-A M.R.S.A. § 7101-B. Similar cases were opened for all other independent telephone companies (ITCs). In January 1999, the Commission issued an order in all of these cases setting the ITCs' access rates beginning May 30, 1999 at or below the National Exchange Carrier Associate (NECA) pool disbursement level. The Commission further explained that the objective over the next two years was to lower access rates from the NECA disbursement level to NECA tariff rates, which more accurately reflect the intent of 35-A M.R.S.A. § 7101-B.

[1] Under 35-A M.R.S.A. § 1305(5)(C), the Commission is authorized to assign staff members as advocates "to facilitate negotiated settlements in the proceeding." As will be discussed in more detail later, at the time this matter was commenced, similar cases were initiated with the other 23 independent telephone companies. All of those cases have been settled without the appointment of advocates, which suggests that the failure to reach a settlement in this case does not stem from the absence of advocates.

The Commission stated its hope that after further discussions, the ITCs and other parties would propose stipulated transition plans for Commission review. If such agreements could not be reached, the Commission would open rate cases to determine what, if any, adjustments to each company's rates would be necessary to ensure that rates would be just and reasonable.

In our November 1998 Order opening this investigation, we explained that rates would be necessary to ensure that although this was an adjudicatory proceeding, we would allow the parties, in consultation with the Advisory Staff, a period of time to try to resolve the issues raised by lower access rates. Of the 23 ITCs, only Cobbosseecontee failed to reach agreement with the other parties and present a plan for adjusting rates that had the support of the Advisory Staff. We therefore required Cobbosseecontee to file the general rate case information and data required by Chapter 120. Maine Public Utilities Commission, Investigation [Investigation into the Rates of Cobbosseecontee Telephone and Telegraph Company Pursuant to 35-A M.R.S.A. §7101-B Docket No. 1998-892, Order, (April 19, 2000).

We decline to change the function of our current advisors to advocates. As described above, Cobbosseecontee has not provided sufficient reason to assign anyone as advocates in this case. In addition, 35-A M.R.S.A. §1305(5)(C) does not permit staff who are advisors in a proceeding to serve as advocates.

We further find that the role played by our Advisors is a permissible one that comports with due process requirements. Cobbosseecontee assented to the process. There was no requirement that any ITC participate in settlement discussions with advisors.

The OPA argues that because the Advisors have stated positions during settlement discussions, they should be disqualified from acting as advisors. Cobbosseecontee further claims that the role played by the advisors violates the MAPA's requirements.

We disagree that the Advisors have been acting in an advocacy capacity. Title 35-A M.R.S.A. §1305(5)(A) now creates an exception to the MAPA that allows advisory staff to place its own independent financial and technical analysis into the record of cases (subject to discovery and questioning by other parties). This type of independent analysis is not considered to be advocacy or prejudging the case. Instead, it allows the parties an opportunity to learn the viewpoints of the advisors prior to the end of a case and encourages agreements among the parties that likely will be acceptable to the Commission. We do not believe our Advisors have "closed their minds" as to any issues to be resolved in this case. They will consider the evidence presented by all parties in making any recommendations to the Commission.

Moreover, as counsel for Cobbosseecontee and other parties are well aware, the Commissioners, and not the advisors or advocates, make the final decisions in all cases. Should Cobbosseecontee or any party believe that any position or opinion

voiced by an advisor, whether in informal discussions or in a "bench analysis," fails to satisfy the Commission's statutory obligations, or should for any reason be rejected by the Commission, Cobbosseecontee remains free to litigate the matter and present any argument and evidence it chooses for consideration by the Commissioners.

Finally, if Cobbosseecontee or any other party believes an advisor is biased, it should comply with the requirements of 5 M.R.S.A. § 9063 and Chapter 110, §753 and "file a timely charge of bias." The statute directs the person against whom the charge is brought to determine the matter as part of the record of the proceeding. If Cobbosseecontee seeks to disqualify an advisor, it should state its reasons and the advisor will file an affidavit in response. Any advisor who could not act in an impartial manner would be disqualified from the case and would not become an advocate.

IV. Other Matters Raised in Motion

Cobbosseecontee continues to argue that this rate case is unnecessary. We decided to proceed with a rate case in our April 19 Order. Cobbosseecontee has presented no new information that would cause us to change that decision.

Cobbosseecontee also questions whether it should have to file a direct case and have the burden of proof in this case. However, it states it will comply with our order to file Chapter 120 information and the Hearing Examiner's procedural order that it file direct testimony in support of its Chapter 120 filing. Because Cobbosseecontee does not appear to be requesting any relief from the Commission, we take no action concerning burden of proof.

Accordingly, we

O R D E R

That Cobbosseecontee Motion for Assignment of Advocacy Staff and other Relief is denied.

Dated at Augusta, Maine, this 3rd day of August, 2000.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.